



BRB No. 21-0066 BLA

JOE W. FRYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA ELECTRIC	)	DATE ISSUED: 11/09/2021
CORPORATION	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Proposed Order Supplemental Award Fee for Legal Services of Diane Felton, Claims Examiner, United States Department of Labor, and Proposed Decision and Order Denying Attorney Fee Reconsideration of Debbie Quick, Claims Examiner, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for Claimant.

Mary Lou Smith (Howe, Anderson & Smith, P.C.), Washington, D.C., for Employer.

Sarah M. Hurley (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and GRESH,  
Administrative Appeals Judges.

PER CURIAM:

Employer appeals Claims Examiner Diane Felton's Proposed Order Supplemental Award Fee for Legal Services and Claims Examiner Debbie Quick's Proposed Decision and Order Denying Attorney Fee Reconsideration granting an attorney fee in connection with a claim filed pursuant the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). Hereinafter both Claims Examiners are jointly referred to as the district director.

Claimant filed a claim for benefits on October 21, 2013. Administrative Law Judge Natalie A. Appetta issued a Decision and Order Awarding Benefits dated February 28, 2017. Pursuant to Employer's appeal, the Benefits Review Board affirmed the award on April 12, 2018. *Frye v. W. Va. Electric Corp.*, BRB No. 17-0340 BLA (Apr. 12, 2018) (unpub.). On May 5, 2020, Claimant's counsel submitted a fee petition to the district director requesting a fee of \$6,898.19 for legal services and expenses. Based on consideration of Employer's objections, including that the fee petition was untimely, the district director granted the fee petition but reduced the requested fee to \$3,354.44. Employer requested reconsideration, which the district director denied.

On appeal, Employer challenges the fee award, asserting that the district director erred in treating the fee petition as timely filed.<sup>1</sup> Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, asserting that the district director's consideration of counsel's fee petition was appropriate and should be affirmed. Employer filed a reply brief in support of its position.

The amount of an attorney fee award is discretionary and will be upheld on appeal unless the challenging party shows it to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

Employer argues that the district director erred in accepting the fee petition as timely. It asserts the terms "shall be filed" and "time limits" contained in 20 C.F.R. §725.366(a) imply the timeframe to submit a fee petition is not "completely open-ended." Employer's Brief at 3. Employer thus urges the Board to recognize an implied deadline

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<sup>1</sup> Employer has not challenged the amount of the attorney's fee awarded. Therefore this finding is affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and reverse the fee award as untimely. Employer’s Brief at 3-5; Reply Brief at 1-2. We decline to do so.

As the Director correctly notes, neither the Act nor the regulations sets a time period for when fee petitions must be filed with the district director. *See* 33 U.S.C. §928. The regulations permit the district director who considers the fee request to set the time limit for filing the petition. *See Bankes v. Director, OWCP*, 765 F.2d 81, 82 (6th Cir. 1985) (“It is within the discretion of the deputy commissioner to set the time limitation for the filing of a fee application for services performed before him in a black lung benefits case.”); 20 C.F.R. §725.366(a).<sup>2</sup> Because Employer has not demonstrated an abuse of discretion, we affirm the attorney fee award in the amount of \$3,354.44.<sup>3</sup>

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<sup>2</sup> The fee petition must be filed “within the time limits allowed by the district director . . . .” 20 C.F.R. §725.366(a).

<sup>3</sup> We note Employer has not argued it was denied due process and an opportunity to contest the fees as a consequence of the amount of time which elapsed before the fee petition was submitted or the delay between the submission of the fee petition and the district director’s order.

Accordingly, the Proposed Order Supplemental Award Fee for Legal Services and Proposed Decision and Order Denying Attorney Fee Reconsideration are affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge

DANIEL T. GRESH  
Administrative Appeals Judge